

No. 7102

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

HARRY D. McCLEARY,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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UPON APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES, FOR THE DISTRICT OF  
MONTANA, MISSOULA DIVISION  
HON. GEORGE M. BOURQUIN, JUDGE

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Supplemental Brief

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STATEMENT OF REASONS FOR PETITION TO  
*File* SUPPLEMENTAL BRIEF

Subsequent to the filing of appellant's brief, and on May 1, 1933, this court handed down the decision in the case of Joseph Falbo vs. United States of America, No. 6965, which might be considered as controlling in this case. For that reason appellant respectfully asks leave of this Court to file this supplemental brief, and respectfully calls to the Court's attention:

The trial court in directing a verdict for defendant relied principally on the case of Nicolay vs. United States, 51 Fed. (2d) 170. On the 28th day of March, 1933, the Circuit Court for the Tenth Circuit, in the case of United States, Appellant, against Gertrude Thomas, Administratrix of the Estate of Burke Thomas, Deceased, and Martha A. Thomas, Appelles, No. 744, handed down an opinion, and that Court said in part as follows:

"It has been held, by this and other Courts, that the plaintiff must establish, by substantial proof, that the insured was totally and permanently disabled while the policy was in force; that proof of minimal or incipient tuberculosis during that period, without more, is not sufficient to carry the case to the jury. It has likewise been held that the subsequent employment of the insured may be of such a nature and duration as to refute conclusively any claim of such disability.

Nicolay v. United States (C. C. A. 10), 51 F. (2d) 170; Hirt v. United States (C. C. A. 10) 56 F. (2d) 80; Roberts v. United States (C. C. A. 10), 57 F. (2d) 514; United States v. Rentfrow (C. C. A. 10), 60 F. (2d) 488; Storey v. United States (C. C. A. 10), 60 F. (2d) 484; United States v. Fitzpatrick (C. C. A. 10), ..... F. (2d) ..... (decided January 3, 1933); United States v. Peet (C. C. A. 10), 59 F. (2d) 728; Eggen v. United States (C. C. A. 8), 58 F. (2d) 616; United States v. Diehl (C. C. A. 4), 62 F. (2d) 343; United States v. Harth (C. C. A. 8), 61 F. (2d) 541. We adhere to the doctrine of these cases; the government contends that such adherence requires a reversal of the present case.

“Counsel for appellees have brought to our attention valuable excerpts from the Report on Tuberculosis made in 1932 by Dr. Arthur Salusbury MacNalty, Senior Medical Officer for Tuberculosis of the Ministry of Health of London; and from the recent work of Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, on Pulmonary Tuberculosis. From these, it appears that the effect of tubercle bacilli varies widely with the individual infected therewith, and that it is impossible to make a definite prognosis at the outset of the disease. It follows, therefore, that while we are concerned only with the condition of the insured when his policy lapsed, subsequent events are of vital import in determining his then condition.”

The modification made by the Tenth Circuit, if such it may be termed, is exactly what the plaintiff is contending for in this case. ~~The medical excerpts is contending for in this case.~~

## ARGUMENT

The medical excerpts referred to by the Tenth Circuit in said opinion are hereinafter quoted. Dr. Arthur Salusbury MacNalty, Senior Medical Officer for Tuberculosis Ministry of Health, London, in his 1932 report on tuberculosis states:

“Tuberculosis is still a killing and tragic disease, the ‘Captain of the Men of Death,’ as Bunyan called it.” (MacNalty Report on Tuberculosis for 1932, page 2).

As I read the Falbo case, I do not consider that it was the intention of this Court to lay down in its findings, principles of fact in that case as principles of law, conclusive upon subsequent litigants. Obviously, this could not be done with the disease of tuberculosis, for it is one of the diseases about which even the greatest specialists admit there is much yet to be learned.

Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, and its county sanitorium for incipient tuberculosis, is an internationally recognized authority on tuberculosis and in his monumental



work on pulmonary tuberculosis (1932 Edition)  
states:

“Attempts are being made to unravel the mystery why when several persons are exposed to infection with tubercle bacilli, and infected, some may become sick, while most remain in comparative, or complete, health; why in familiar tuberculosis, a few descendants of phthisical parents will develop tuberculosis disease and perhaps die as a result of it, while several others, equally exposed to infection and raised in the same environment, remain healthy; why of those who become sick, some, though very few, suffer from a very acute and rapidly fatal disease, like military tuberculosis, or pneumonic phthisis, or exudative lesions which pursue a progressive course terminating fatally sooner or later; while many others have chronic fibroid lesions which are more or less benign and compatible with moderate activity in life; why, in still others, the virus produces evidence changes in the lungs and pleura, but the process is abortive, the patient and his physician knowing little or nothing of the infection. Reasons are sought for the preference of the virus to attack in some people the lungs, in others the glands, joints, bones, or serous membranes of the chest, abdomen, or the cerebrospinal axis.”  
Fishberg, Volume 1, page 114.

“Attention has recently been turned to accessory non-parasitic causes of phthisis, among which there are many, including endogenous, such as

heredity, anatomical and biochemical peculiarities of the individual, etc., and also exogenous, including environmental peculiarities, such as economic conditions, including occupation, housing, nourishment, etc., and also the geographical milieu. As will be seen from the succeeding pages, the results have so far been very meagre, but when a bacteriologist of the magnitude of Theobald Smith is constrained to say that non-parasitic factors are necessary conditions in the origin of infectious diseases and far outweigh the living agent in etiological significance, it is clear that they are worthy of intensive study." Fishberg, *Pulmonary Tuberculosis*, Volume 1, page 115, 1932 Edition.

Since tuberculosis specialists make statements like the above in regard to tuberculosis, it occurs to us that it is extremely hazardous for courts and lawyers to make any final and conclusive generalization of facts in regard to it.

The common run of man's conception of tuberculosis, covering a period of 5,000 years or until a very recent time, was covered by the description of the disease given by Dickens in *Nicholas Nickleby*, to-wit:

"There is a dread disease which so prepares its victim, as it were, for death; which so refines its grosser aspect and throws around familiar looks unearthly indications of the coming change; a dread disease in which the struggle between soul

and body is so gradual, quiet and solemn and the result so sure, that day by day, and grain by grain the mortal part wastes and withers away so that the spirit grows light and sanguine with its lightening load, and, feeling immortality at hand, deems it but a new term of mortal life; a disease in which death and life are so strangely blended that death takes the glow and hue of life and leaves the gaunt and grisly form of death; a disease which medicine never cured, wealth never warded off, or poverty could boast exemption from; which sometimes moves in giant strides and sometimes at a tardy sluggish pace but, slow or quick, is ever sure and certain."

MacNalty states:

"The description of Caroline Helston's illness was penned by Charlotte Bronte from sad experience of pulmonary tuberculosis, responsible for the death of her gifted sister, Emily \* \* \* 'With all this care, it seemed strange the sick girl did not get well; yet such was the case; she wasted like any snow-wreath in thaw; she faded like any flower in drought.' (Shirley, Chap. XXIV)."

MacNalty also reports that Laennec, the physician who discovered auscultations as applied to the diagnosis of tuberculosis and who succumbed to the disease, wrote:

"It has been shown above, that the cure of

phthisis (tuberculosis) is not beyond the powers of nature, but it must be admitted, at the same time, that art possesses no certain means of attaining this desirable end." MacNalty, *A Report on Tuberculosis*, 1932, pages 2-3.

We appreciate that good results have been secured by rest, fresh air and proper nourishment, and this is more pronounced at the present date, that is, 1932 than in 1919, for the reason that great advances have been made in the prevention of the spread of tuberculosis and also in its treatment.

That tuberculosis is still a dread and fatal disease cannot be questioned, because it is the disease that causes ten per cent of all the deaths that occur among civilized people. These figures, however, are for the population as a whole, including the young, middle-aged and the old, and male and female, but when we consider the position of the World War Veteran, which is that of early manhood, the age of which is from about 20 to 35, we find that tuberculosis is the most destructive disease among us.

In the year 1930, according to the United States census, the total deaths from tuberculosis in the United States Registration Area, which embraces practically the whole United States, among males between the ages of 20 and 35 amounted to 13,722, while only

4,497 were caused by heart disease, 1,257 by cancer, 1,960 by nephritis, 693 by cerebral hemorrhage, and 4,941 by pneumonia, for males of that age.

Thus we find that between the ages of 20 and 35 in the Registration Area of the United States that tuberculosis caused more deaths than heart disease, cancer, nephritis, cerebral hemorrhage and pneumonia combined, the total for those diseases being 13,348, while tuberculosis caused 13,722 deaths. Mortality Statistics, 1929, pages 196-219, U. S. Dept. of Commerce.

So, among the five leading causes of death in the United States (accidents excluded) among men between 20 and 35 years of age, that tuberculosis not only leads all others but caused more deaths than the remaining four leaders combined.

For the year 1929, in England and Wales, 33.2 per cent of all the deaths among the males between the ages of 25 and 35 were caused by tuberculosis, and of the deaths occurring between the ages of 15 and 25, the percentage caused by tuberculosis was 33.4. See MacNalty, A Report on Tuberculosis, 1932, page 6.

No country in the world has made as much progress in the prevention and treatment of pulmonary tuberculosis as England. As early as 1912 a national act was passed providing for examinations and treat-

ments, not only of cases that had been diagnosed as tubercular, but of suspects, and still we find that 33 per cent of all the deaths occurring among the male population between the ages of 15 and 35 in England and Wales during 1929 were caused by tuberculosis. In regard to the efficacy of even sanatorium treatment, we find that the experience of England for the year 1929 shows that where 35,550 were admitted, only 18 per cent were discharged in a quiescent condition, and that although 13,637 were admitted without a positive sputum, only 37 per cent of the 13,637 of those who did not have a positive sputum on admission were discharged from the institutions in a quiescent condition. MacNalty, *A Report on Tuberculosis*, 1932, page 87. After giving numerous statistics MacNalty states:

“Although sanatorium treatment may secure quiescence of the disease in a reasonable proportion of cases a definite tendency to relapse remains. It is therefore necessary in attempting to assess the true value of sanatorium treatment, to study the after-histories of patients.” MacNalty, *A Report on Tuberculosis*, 1932, page 90.

Fishberg states, in speaking of an arrested case of tuberculosis, as follows:

“If the improvement has been attained through careful treatment in a favorable environment, the

test is whether the patient remains in good condition for some time after returning to his old environment without suffering a relapse of the constitutional symptoms. The test, in other words, is duration; improvement counts if it lasts without special treatment." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, page 247.

And he also states:

"Indeed, I have been struck with the fact that when a patient who recovered from phthisis (tuberculosis) is unable to pursue the vocation for which he has been trained for many years, he will not do well, even if he remains idle indefinitely." Fishberg, Volume II, page 308.

And then he states:

"On the whole, it appears that cured patients do best when returning to their old vocations for which they have been trained, and at which they can earn the most with the least possible effort. It may be said that, with some striking exceptions, if a patient is not able to pursue his former line of work he is altogether disabled." Fishberg, Volume II, page 309.

Fishberg also reviews figures having to do with treatment of patients of their after histories and points out that of 1914 persons given sanatorium treatment in the year 1914 under Dr. Taylor, Tuberculosis Officer for the Country Borough of Halifax, by 1920, or

six years later, 76.5 per cent were dead and of the remaining 23.5 one-half were unable to work. Fishberg, Volume II, page 354.

Specialists tell us that 95 per cent have minimal or incipient tuberculosis and have an activity sometime during their lives, but in the great majority of these cases, the patients are not sick with the disease of tuberculosis like Harry D. McCleary is and has been. The whole point is whether the tubercular bacilli makes the individual sick. If it does, he has a disease of tuberculosis, and not the so-called "incipient tuberculen."

Dr. Fishberg states as follows:

"It must, however, be mentioned here, a point which will be discussed in detail later on, that in human beings infection alone is not sufficient to produce disease; after all, disease occurs only in a comparatively small proportion of persons infected with tubercle bacilli. In other words, while there is no tuberculosis without tubercle bacilli, these micro-organisms harm only those who are predisposed to the disease. We are more and more becoming convinced that phthisiogenesis is more a problem of predisposition than of bacterial infection." Fishberg, Volume 1, page 112 (1932 Edition).

When tubercular condition once develops so as to cause the patient to exhibit the symptoms which it is



admitted, or at least not contradicted, Harry D. McCleary had before he ceased paying premiums on his insurance, it is a disease disabling in character and deadly in its consequences, "The Captain of the Men of Death."

We submit that there is no speculation now after 14 years, that Harry D. McCleary's pulmonary tuberculosis, in 1919, was permanent. This has been proved by subsequent events. According to the tuberculosis experts above quoted, nothing but speculation in that regard could have been made, in 1919 or 1920. There might be some speculation now that if McCleary had been in a hospital and under prescribed treatment from the day he was discharged from the army until now, his condition might not be quite so far advanced; but for this Court to hold, as a matter of law, that McCleary was not permanently disabled in 1919 and take this case from the jury and not permit it to consider his subsequent history to determine whether the condition was permanent in 1919, we submit, is to simply hold that, as a matter of law, no tuberculosis case can be proved permanent until at some specific date after the lapsation of many years, or until the patient is dead.

It is uncontradicted in this case that McCleary had five months hospitalization for inhaling of poisonous

gases and influenza, before he was discharged from the army. Certainly this would make his case distinguishable from an incipient tubercular, as classified by the experts, who never became sick.

We respectfully submit that the jury should be permitted to take into consideration all the evidence in this case and determine whether or not McCleary was permanently and totally disabled when he was discharged from the army in 1919.

Respectfully submitted,

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